No. 14-462

IN THE

Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, ET AL.,

Respondents.

On Writ of Certiorari to the
California Court of Appeal

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public.

Public Citizen has longstanding interests in promoting the proper use of class actions to secure the rights of large numbers of people who have suffered legal wrongs, as well as in curbing misuse of class actions. Public Citizen is also concerned with the effects of mandatory arbitration on the rights of consumers and workers, particularly to the extent that arbitration agreements may prevent the effective pursuit of class remedies. In addition, Public Citizen has addressed issues concerning federal preemption of state law in a variety of contexts not limited to arbitration.

As a result of these interests, Public Citizen's attorneys have participated, as counsel to parties or to Public Citizen and other amici curiae, in many cases involving class actions, arbitration, and preemption, both in this Court and the lower federal and state courts. These issues converge in this case, and Public Citizen accordingly submits this brief to address fundamental misconceptions about the nature of federal preemption, and in particular preemption under the Federal Arbitration Act (FAA), that animate the positions asserted by DIRECTV and its amici curiae.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. Counsel for all parties have filed letters of consent to filing.

SUMMARY OF ARGUMENT

This case presents only a question about how to interpret a provision in a contract between the parties. Under that provision, the contract does not permit arbitration of any dispute between the parties if "the law of [the consumer's] state would find [the contract's] agreement to dispense with class arbitration procedures unenforceable." Does the contract refer to the state law that would apply in the absence of preemption by the FAA? Or does it mean the law of the state unless that law is preempted by the FAA? The state court's adoption of the former interpretation—which in this case bars arbitration because the law of California would not allow enforcement of the class-action ban—poses no genuine issue of federal preemption, as the state court's holding that arbitration may not proceed merely reflects the parties' agreement as reflected in the words of their contract.

DIRECTV and its amici strain to transform the contractual issue posed by the case into one of federal preemption by suggesting that, as a matter of constitutional law under the Supremacy Clause, the parties' contract cannot be construed to refer to a preempted state law. Indeed, they argue, it is meaningless to refer to a conflict-preempted law as the law of the state, because under the Supremacy Clause, state law in conflict with federal law does not exist, and the preemptive federal law is the law of the state.

Those arguments are wrong on three levels. First, the status of state law under the Supremacy Clause does not control the meaning of the words used by parties to a contract. Rather, under the applicable state-law principles of contract construction, those words must be given their ordinary meaning. And the

ordinary meaning of "law of a state"—indeed, the meaning used in the Supremacy Clause itself and in innumerable opinions of this court—is the state's own law, not federal law that may supplant it under principles of federal preemption.

Second, even as a matter of constitutional law, referring to a preempted state law as the law of the state is not meaningless. The Constitution incorporates the assumption that the laws of the states may at times be contrary to federal law, and it provides a rule of decision in the event of such conflict: Federal law applies. But that federal law renders a conflicting state law ineffective does not change the fact that the preempted law is a state law.

Third, the claim that state laws concerning arbitration that are subject to conflict preemption by the FAA do not exist is impossible to square with the limits on FAA preemption. The FAA does not preempt the field of arbitration regulation, and its application is not universal. States may have and enforce laws—even laws that resolve arbitration issues the opposite way from the FAA—regulating arbitrations that fall outside the FAA's scope. Furthermore, parties to arbitration agreements subject to the FAA may, as this Court has held, choose to apply state-law principles regarding arbitration that, but for the parties' choice to apply them, would conflict with the FAA. That option—exercised by the parties in this case—is incompatible with the proposition that a state law that may come into conflict with the FAA is not the law of the state.

ARGUMENT

I. This case presents an issue of contract construction that does not genuinely implicate the Supremacy Clause.

Properly viewed, this case presents no preemption issue, but only a question of contract construction: What does the contract in this case mean when it provides that there is no agreement to arbitrate if "the law of your state would find this agreement to dispense with class arbitration procedures unenforceable"? That question, like questions of contract construction generally, is fundamentally one of state law, even as to agreements concerning arbitration. *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010); *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474–76 (1989). Nothing in the FAA displaces "background principles of state contract law regarding the scope of agreements" about whether to arbitrate. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009).

Principles of contract interpretation that reflect hostility to or discrimination against arbitration may, of course, be preempted by the FAA. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). But there is no serious argument that the principles applied by the state court here—giving effect to the natural meanings of words used in a contract, granting specific language priority over more general provisions, and construing language against the drafter of a form contract—reflect the kind of hostility toward arbitration that could require preemption by the FAA. The court did not "construe th[e] agreement in a manner different from that in which it otherwise con-

strues nonarbitration agreements under state law." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

Nonetheless, DIRECTV and its amici argue that the state court improperly gave effect to state laws that are preempted under this Court's ruling in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). That argument misconceives what the state court did when it held that the parties' contract did not provide for arbitration of this case. *Concepcion* held that state laws that refuse enforcement to arbitration agreements forbidding plaintiffs to pursue class actions are in conflict with the FAA and hence cannot apply of their own force in cases subject to the FAA. But the state court here did not hold that the preempted state-law principles applied of their own force: It gave effect to the *parties' agreement* not to arbitrate when the customer lives in a state under whose law a class-action ban *would* be unenforceable absent the FAA. In such a case, "it is the parties' agreement, and not [state] law, that prevents arbitration." C. Drahozal, *Contracting Around Hall Street*, 14 Lewis & Clark L. Rev. 905, 919 n.73 (2010). Hence "there is nothing for the FAA to preempt." *Id.*

For example, "under well-settled preemption principles, a state law that precludes arbitrators from resolving claims under a particular state statute (such as a franchisee protection statute) would be preempted. But the FAA certainly does not preclude the parties themselves from agreeing to exclude claims under the state franchisee protection statute from their arbitration agreement." P Butler & C. Drahozal, *Contract and Choice*, 2013 B.Y.U.L. Rev. 1, 26. And parties may express such an agreement using language that "incorporates by reference state arbitration law

to define its scope," and if they do so, courts should "enforce the agreement so construed." *Id.*

Moreover, should the parties express an agreement not to arbitrate, or to limit the scope of arbitration, by incorporating state-law provisions or principles by reference, the possibility that the state law in question might itself reflect hostility toward or discrimination against arbitration should have no bearing on the enforceability of the parties' agreement. C. Drahozal, *supra*, at 919 n.74. State laws that are hostile to arbitration may be unenforceable in cases involving agreements subject to the FAA, but no principle of law forbids the enforcement of *contracts* that reflect hostility toward or discrimination with respect to arbitration. "[T]the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). As far as the FAA is concerned, contracts may refrain from providing for arbitration of disputes—or "discriminate against arbitration"—on any basis the parties choose. "[T]he FAA does not require parties to arbitrate when they have not agreed to do so, ... nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." *Volt*, 489 U.S. at 478.

Thus, this Court held in *Perry v. Thomas* that California Labor Code § 229, which prohibits enforcement of an agreement to arbitrate an action to collect unpaid wages, cannot be applied to bar arbitration under a contract governed by the FAA because the statute conflicts with the FAA's "clear federal policy" that agreements to arbitrate be "rigorously enforce[d]." 482 U.S. at 490–91. In contrast, the FAA

would not preempt enforcement of an agreement in which the parties themselves excepted actions to collect unpaid wages from an agreement to arbitrate. Indeed, the FAA's "clear federal policy" would demand that the parties' exception be "rigorously enforce[d]." *Id.* The outcome should be the same whether the parties set forth the exception by saying, "actions for unpaid wages are not subject to arbitration under this agreement," or by stating that "claims that would fall within the scope of California Labor Code § 229 are not subject to arbitration under this agreement."

II. The state court's construction of the contract is not foreclosed by federal preemption principles.

Although the decision below rests on the construction and enforcement of a contract, DIRECTV and its amici contend that preemption principles remain relevant. They argue, in essence, that a preempted state law is a nullity that ceases to exist—that is, that a preempted state law is not a state law. Rather, they argue, the preemptive federal law itself is the law of the state. Pet. Br. 19; WLF Br. 6–7, 14–19; PLF Br. 3-19. The argument is wrong as a matter of contract construction, preemption doctrine generally, and FAA preemption doctrine specifically.

A. As a matter of common usage, a preempted state law is law of the state.

The issue here is what the *contract* means by "law of your state," not what the metaphysical status of preempted state laws may be as a matter of Supremacy Clause jurisprudence. Under California law, as under the statutory and common law of the states generally, "[t]he words of a contract are to be understood in their ordinary and popular sense, rather than ac-

cording to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." Cal. Civ. Code § 1644; *see, e.g.*, *Crawford v. Weather Shield Mfg., Inc.*, 187 P.3d 424, 430 (Cal. 2008). In ordinary usage, the "law of a state" refers to the state's own common or statutory law, not to federal laws that may preempt particular applications of the state's laws.

Indeed, the Supremacy Clause itself provides that the Constitution and the laws of the United States enacted thereunder are the supreme law of the land and bind judges in the states, "any Thing in the *Constitution or Laws of any State* to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2 (emphasis added). The Constitution itself thus refers to the conflicting state enactments that it preempts as the "Laws of [a] State." This Court's preemption decisions likewise regularly and consistently refer to state enactments or common-law principles that are subject to federal preemption as "state laws" or "laws of" particular states.[2]

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[2] Examples are too numerous to catalog. Some recent instances (with emphasis added in each citation) include: *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015) (observing that field preemption operates "irrespective of whether *state law* is consistent or inconsistent with 'federal standards,'" while conflict preemption exists where "compliance with *both state and federal law* is impossible" or where "*state law*" is an obstacle to federal policy); *Armstrong v. Exceptional Child Care Ctr.*, 135 S. Ct. 1378, 1384 (2015) (noting that "a court may not convict a criminal defendant of violating a *state law* that federal law prohibits"); *Northwest, Inc. v. Ginsburg*, 134 S. Ct. 1422, 1432 (2014) ("When the *law of a State* does not authorize parties to free themselves from the covenant, a breach of covenant claim is

(*Footnote continued*)

The notion that referring in a contract to preempted state law as the "law of a state" meaninglessly invokes something that "in legal contemplation does not exist," WLF Br. 16 (quoting *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1, 57 (1912)), founders on the fact that this Court's opinions and the Supremacy Clause employ exactly that usage.

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pre-empted ...."); *Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013) (pointing out that the framers of the Constitution rejected a proposal to allow a federal veto of state laws "in favor of allowing *state laws* to take effect, subject to later challenge under the Supremacy Clause"); *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2473, 2476 (2013) (describing applicable "*duties under state law*" before holding state law preempted because "*state law requires*" actions that "federal law forbids"); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013) (holding that federal law "pre-empts *Arizona's state-law requirement*" that officials deny registration to voters using a federal registration form); *Hillman v. Maretta*, 133 S. Ct. 1943, 1952 (2013) (finding preemption of state law concerning disposition of federal employee insurance benefits because "*applicable state law* 'substitutes the widow' for the 'beneficiary Congress directed ...'"); *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) ("The FAAAA's preemption clause prohibits enforcement of *state laws* 'related to a price, route, or service of any motor carrier ... with respect to the transportation of property.'"); *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1398 (2013) (observing that preemption analysis requires analysis of "what *the state law* in fact *does*"); *Concepcion*, 131 S. Ct. at 1753 (holding that "California's *Discover Bank* rule" is preempted).

B. The Supremacy Clause and this Court's preemption jurisprudence presuppose that state law may conflict with federal law, and supply a rule of decision for resolving such conflicts.

The suggestion that it is meaningless to speak of a preempted state law is also contrary to a proper understanding of Supremacy Clause doctrine. The text of the Clause presupposes the possibility that federal law may conflict with the law of a state—that is, that there may be some "Thing" in a state's law that is "Contrary" to federal law. U.S. Const., art. VI, cl. 2. As relevant here, the Clause prescribes a particular consequence in the event of such a conflict: judges in a state must apply federal law rather than the contrary law of their own state. *Id.* As this Court recently put it, "[i]t is apparent that this Clause creates a rule of decision" for a particular type of conflict of laws—conflict between state and federal law. *Armstrong*, 135 S. Ct. at 1383. Thus, courts "must not *give effect* to state laws that conflict with federal laws." *Id.* (emphasis added; citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824)). As the Court put the matter in *Gibbons* itself, when a state's law is "contrary to the laws of Congress, made in pursuance of the constitution," then "the act of Congress ... is supreme; and the *law of the State*, though enacted in the exercise of powers not controverted, must yield to it." 22 U.S. (9 Wheat.) at 211 (emphasis added).

Preemption, then, does not rest on the fiction that conflicting state law does not exist. Rather, preemption rests on the principle that, in the event of a conflict, both the governments and people of the United States must follow, and courts must apply, federal law

rather than state law. As this Court has repeatedly stated, federal laws are "laws in the States," *see, e.g.*, *Howlett v. Rose*, 496 U.S. 356, 367 (1990), and must be followed in preference to state laws to the extent of any conflict between the two.[3] State laws are *ineffective* insofar as they may conflict with federal law, because "a valid federal law is substantively superior to a state law," *Haywood*, 556 U.S. at 751 (Thomas, J., dissenting)—but that does not make it improper or meaningless to distinguish between state and federal law or to refer to a preempted state law as state law.

C. The FAA does not bar parties from choosing to apply otherwise-preempted state laws.

The proposition that preempted state law cannot be referred to as the "law of the state" is particularly hard to square with the limited scope of preemption under the FAA. As this Court has emphasized, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt*, 489 U.S. at 477. Federal law thus "has not completely displaced state regulation" of arbitration, and preempts state arbitration law only "to the extent that it actually conflicts with federal law." *Id.*

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[3] *Haywood v. Drown*, 556 U.S. 729, 734 (2009), is a unusual instance of the Court's referring to federal law as law "of" the states, but that usage does not appear to have been critical to the Court's holding, which was an application of longstanding case law providing that state courts must give effect to federal rights of action because, under the Supremacy Clause, federal law must be applied by "Judges in every State." U.S. Const., art. VI, cl. 2.

State law can "conflict" with the FAA, of course, only where the FAA applies. The FAA is limited by its terms to arbitration agreements in contracts involving transactions in interstate commerce, 9 U.S.C. § 2, and it excludes employment contracts involving seamen, railroad employees, and other transportation workers. 9 U.S.C. § 1. States are entirely free to regulate, limit, or even prohibit arbitration agreements that are not subject to the FAA in whatever way they wish (subject, of course, to constitutional constraints and the possibility of preemption by laws *other* than the FAA), regardless of whether their laws would conflict with the FAA if applied to contracts within the FAA's scope.

Thus, for example, California Labor Code § 229's prohibition of compelled arbitration of actions for unpaid wages, held preempted by the FAA in *Perry v. Thomas*, 483 U.S. 483, remains applicable to claims of transportation workers, as their employment contracts are not covered by the FAA. Likewise, the California Supreme Court's ruling in *Discover Bank v. Superior Ct.*, 113 P.3d 1100 (Cal. 2005), and California's statutory prohibition on waiver of the right to bring class actions under the Consumers Legal Remedies Act, Cal. Civ. Code § 1751, remain effective as to arbitration agreements outside the FAA's scope.

Moreover, as this Court emphasized in *Volt*, the fundamental policy of the FAA—that arbitration agreements be enforced "according to their terms," 489 U.S. at 476—places important limitations on the law's preemptive effect. As *Volt* illustrates, one consequence of that policy is that parties are free to choose to have their agreements concerning arbitration governed by state laws even when, absent that choice, the

FAA would require a result different from the state laws chosen by the parties. *See id.* at 479.

In *Volt*, a state court had construed the parties' arbitration agreement to call for the application of the California Arbitration Act rather than the FAA. The result was that arbitration was stayed under California law under circumstances where the party seeking arbitration claimed that the FAA would require an order staying litigation pending arbitration. *See id.* at 471–72. That is, *Volt* involved a situation where a party claimed that federal and state law required *opposite* results as to whether arbitration would occur, so that absent the parties' agreement to the application of state law, federal law (if applicable) would necessarily preempt application of state law. This Court noted that the parties did not dispute that the FAA applied to their agreement, which involved a transaction in interstate commerce, and the Court assumed that the party seeking to arbitrate was correct in asserting that, but for the parties' agreement to apply state law, the FAA would forbid staying the arbitration. *Id.* at 476–77. The Court held, however, that far from preempting the application of the conflicting state-law rule agreed to by the parties, the FAA allowed the state court to give effect to the parties' choice. *See id.* at 475–78.

Indeed, the Court explained that giving effect to the parties' agreement promoted the fundamental policy of the FAA:

> Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the

> Act would otherwise permit it to go forward. By permitting the courts to "rigorously enforce" such agreements according to their terms, ... we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.

Id. at 479.

This Court's holding in *Volt* would make no sense if preemption principles actually dictated that a conflict-preempted state law could not be treated as the law of a state for any purpose, not even the construction of a contract referring to state law. If FAA preemption had that effect, the Court in *Volt* would have had to hold that the parties' choice of "California" law to govern their arbitration required application of the conflicting FAA rule because federal law, not conflict-preempted state law, was actually the law of California. *Volt*'s holding cannot be squared with the assertion that it is meaningless or ineffectual for a contract to refer to a state law whose application to particular circumstances would be preempted by federal law as the law of the state.

The Court's decision in *Mastrobuono* likewise lends no support to the arguments of DIRECTV and its amici. There, the Court assumed that the parties could, if they chose, adopt New York state law's prohibition on the award of punitive damages, even though the FAA would otherwise preempt a state's attempt to limit the matters that could be delegated to an arbitrator. *See* 514 U.S. at 57–58. The Court held, however, that the contract in question did not select New York law to govern the remedies available in arbitration. Rather, in light of the fact that the contract specifically selected NASD rules (which al-

lowed punitive damages) to govern its arbitration provision, the Court interpreted the broader, generic choice-of-law provision referencing New York law as a choice of substantive law rather than arbitration law. *See id.* at 58–64.

Here, the situation is reversed: Although the contract generically states that its section concerning arbitration is governed by the FAA, it specifically provides that whether the provision may be enforced to require arbitration as to any particular consumer depends on whether the contract's bar on class proceedings would be enforceable under the law of the consumer's state. The critical contract construction principles that the Court applied in *Mastrobuono*—giving effect to all provisions of the contract, harmonizing provisions by not applying a general provision to a subject addressed directly by a more specific provision, and construing an agreement against its drafter—point to exactly the opposite result in this case from that reached in *Mastrobuono*.

As the contrast between *Mastrobuono* and *Volt* illustrates, this case does not really turn on whether giving effect to a contract's choice of otherwise conflict-preempted state law is contrary to—or somehow rendered meaningless by—broad principles of preemption. The question presented is solely what the terms of this contract mean when they refer to the law of the state. Indeed, DIRECTV itself ultimately admits that the preemption principles cited by it, and discussed at greater length by its amici, are window-dressing when it acknowledges that "[c]ontracting parties can always choose, of course, to bind themselves by reference to state law that has been 'nullified' by federal law, just as they can choose to bind

themselves by reference to the rules of a board game." Pet. Br. 20. DIRECTV's concession on this point effectively admits that what it described in its petition for a writ of certiorari as the "first" reason the case presented an issue of federal law meriting review—that under the Supremacy Clause, "there is no such thing as state law immune from the preemptive force of federal law," Pet. 10—is a red herring. Stripped of its Supremacy Clause veneer, DIRECTV's argument s just that the state court "erred" in "interpret[ing]" the idiosyncratic agreement in this case. Pet. Br. 11.

As respondents' brief points out, that argument poses the kind of state-law issue as to which this Court generally lacks authority to second-guess a state court, and DIRECTV has in any event failed to demonstrate that the state court here erred in resolving it. In light of DIRECTV's bait-and-switch substitution of a garden-variety contract construction claim for the constitutional issues touted in its petition, this Court may wish to accept respondents' suggestion that it dismiss the writ as improvidently granted. *Cf. City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1772–74 (2015); *id.* at 1778–80 (Scalia, J., concurring in part and dissenting in part). Alternatively, this Court may see fit to decide the case either by construing the contract itself or (more properly) adopting the state court's construction as authoritative in light of the state-law nature of the issue of contract construction. In no event, however, should the Court's disposition turn on the notion that the state court's resolution of this case is somehow contrary to fundamental Supremacy Clause principles.

CONCLUSION

The Court should affirm the decision of the California Court of Appeal.

Respectfully submitted,

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